IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. ———

CARL F. KORTEPETER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

No. ———

GURNEY G. DERBYSHIRE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is found in the record at pages 220 to 227. It is not yet officially reported.

II.

JURISDICTION TO REVIEW THE JUDGMENT.

This Court has jurisdiction to review the judgment under the Act of March 8, 1934 (48 Stat. 926, 18 U. S. C. A. § 723a). The annexed petition, this brief and the record have been filed before the expiration of the thirty days prescribed by Rules XI and XIII of the Rules of Practice and Procedure promulgated May 7, 1934 (292 U. S. 661, 666), made applicable by Rule 38(2) of this Court. (306 U. S. 717.)

Excluding five Sundays (September 29, October 6, 13, 20 and 27) and one legal holiday, October 12 (Indiana Acts 1931, Ch. 88, § 1, p. 254), such thirty days expires October 30, 1940.

STATEMENT OF THE CASE.

In addition to the summary statement contained in the petition a more extended summary of the various writings referred to in the opinion is necessary to proper understanding of the case.

July 17, 1937, the President allotted $828,518 for county wide use under Project Number 465-52-1-15 on unspecified highways in Marion County, outside Indianapolis, Indiana.

> "To construct, surface, resurface, grade, repair or improve or aid in constructing, surfacing, resurfacing, grading, repairing or improving highways, roads and streets and work incidental thereto. All work to be on non-Federal publicly owned property or upon property where the necessary leases or easements will be or have been obtained by local authorities; provided, that no Federal funds will be used for the purchase of land or for the payment of leases or easements.

INDIANA		State W. P. A. Number	Allotment	Project Number
Location	Description			
Marion Co.	County-wide.	85072 (302056)	$828,518	O. P. 465-52-1-15
52-000-49	Repair and improve county roads, not a part of the Federal Aid Highway			
1080	System, throughout Marion County, exclusive of the city of Indianapolis, by (widening right-of-way, resetting fences, ditching, building berms, grading, resurfacing with bituminous macadam and/or gravel), and performing appurtenant work. County owned property."			

Ex. E, II R. 317, 319, R. 77.

Upon application supplemental to this project (II R. 328) the President allotted an additional $1,005,959 to

"Marion Co. County-wide	Repair and improve county roads, not a part of the Federal Aid Highway System, throughout Marion County, exclusive of the city of
52-000-49	Indianapolis, by widening right-of-way, resetting fences, ditching, building berms, grading, resurfacing
0-1080	with bituminous macadam and/or gravel, and performing appurtenant work. County-owned property."

Upon application made to continue (Ex. 3, II R. 22, R. 19) the same project the President allotted an additional $2,187,179 to

> "Improve county-owned roads throughout Marion County including widening; filling; grading; draining; cutting ditches; shaping berms; surfacing; clearing; resetting fences; landscaping; improving and constructing small bridges, culverts, and other structures; painting; and performing incidental and appurtenant work."
>
> Ex. 4. II R. 174, 175, R. 20.

Government's Exhibit X3 (II R. 296-299) indicates that both "supplemental" and "continuation" project applications were used for procuring funds to be used to provide additional funds for work to be operated *within the scope of the original authorization,* the second being used where funds to be allotted have been appropriated under subsequent statute (II R. 297).

It is significant that in the sponsors' *proposals* for each of the above allotments, reference was made to anticipated construction of "farm to market" highways, and to intended repair of flood damage (II R. 308, 323, 156). In the first two *applications* these references were repeated (II R. 315, 329); in the last *application,* it was simply stated that the purpose was to provide "for continuation of work formerly approved" (II R. 172), but in no instance does any express limitation to "farm to market highways," "repair" or "rehabilitation" of "existing highways," or other of the limitations referred to by the Circuit Court of Appeals appear in the Presidential authorization.

General Letter 190, Government's Exhibit 69 (II R. 178-180), dated July 12, 1938, purports to prescribe "General Requirements for Eligibility" and is on its face a direction

for the preparation of applications for new projects, without any express reference to operation of projects already approved. It assumes to declare ineligible projects involving the extension or improvement of streets where abutting property is in the hands of a small number of individuals. (II R. 178.) State Bulletin 103, issued by the Indiana State Administrator, did assume to interpret this as applying to work under "approved projects operating." (Ex. 68, II R. 177.)

SUMMARY OF THE ARGUMENT.

I.

Evidence as to the exact character of the actual and contemplated use of W. P. A. funds and labor having been undisputed, the question whether or not such use was unauthorized was a question for the Court, not the jury, and in upholding the Trial Court in leaving this question to the jury, and in sustaining the jury's verdict, without consideration of all applicable instruments, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and of other Circuit Courts of Appeals.

Hamilton v. Liverpool, London and Globe Insurance Co., (1890) 136 U. S. 242;

Equitable Life Assurance Society of the United States v. Wells, (C. C. A. 6, 1939) 101 F. 2d 608;

Union State Bank & Trust Co. v. Northwestern Life Ins. Co., (C. C. A. 5, 1932) 55 F. 2d 1070;

Burrows & Kenyon, Inc. v. Warren, (C. C. A. 1, 1925) 9 F. 2d 1;

Schloss Bros. & Co. v. Charles Stern Co., (C. C. A. 5, 1929) 36 F. 2d 628;

McKnight v. U. S., (C. C. A. 9, 1935) 78 F. 2d 931;

United States v. Dennett, (C. C. A. 2, 1930) 39 F. 2d 564, 76 A. L. R. 1092;

United States v. White Oak Coal Co., (C. C. A. 4, 1925) 5 F. 2d 439.

II.

To the extent that it assumed to construe the various documents thought to delimit the authorized purview of the construction permitted to be done, the Circuit Court of Appeals gave expressions of intention in the Sponsors' proposal for allotment of funds controlling effect over broader authorization contained in the Presidential Letter of allotment, and thereby erroneously decided an important question under the Emergency Relief Appropriation Act of 1938.

III.

Knowledge of facts making a plan unlawful or fraudulent is of the essence of the intent to defraud necessary to conviction under the indictment in this case, and such knowledge or intent cannot be inferred from the fact that Derbyshire got something for nothing.

Pettibone v. United States, (1893) 148 U. S. 197, 206-207;

Morrison v. California, (1934) 291 U. S. 82;

Landen v. United States, (C. C. A. 6, 1924) 299 Fed. 75.

IV.

The judgment should be reversed as to both defendants under any ground stated in the petition. Since a conspiracy required more than one conspirator, acquittal of Derbyshire necessarily requires acquittal of Kortepeter.

Morrison v. California, (1934) 291 U. S. 82.

ARGUMENT.

I.

Evidence as to the exact character of the actual and contemplated use of W. P. A. funds and labor having been undisputed, the question whether or not such use was unauthorized was a question for the Court, not the jury, and in upholding the Trial Court in leaving this question to the jury, and in sustaining the jury's verdict, without consideration of all applicable instruments, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and of other Courts of Appeals.

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United States v. White Oak Coal Co., (C. C. A. 4, 1925) 5 F. 2d 439.

The petitioners have been convicted of diverting W. P. A. appropriations "for the benefit of persons not entitled thereto," and of conspiring to defraud the United States by causing W. P. A. appropriations to be applied to unauthorized work, which was, as stated in the opinion of the Circuit Court of Appeals "in laying two streets in a fourteen-acre tract of farm land owned entirely by Derbyshire." (R. 222.) Derbyshire dedicated the streets to the county, which dedication was accepted. (Defts.' Ex. A, II R. 305, R. 27.)

As pointed out in the petition for certiorari, the Trial Court left to the jury to determine, upon undisputed evidence, whether the roads or highways *even though dedicated to public use* were without the scope of permissible construction "under the letter of the President and bulletins issued by proper authorities." (R. 95.) The Circuit Court of Appeals sustained this action, and in upholding the verdict considered *one* project proposal, *no* application, (although the application of this series did not embody the same terms as the proposal), and *one* Presidential Letter.

The Court did not decide that the Presidential Letter of 1937 (Defts.' Ex. E, II R. 319, R. 77), which clearly authorized construction of new roads, was inapplicable. Surely it was not intended to hold it inapplicable by mere silence, when the Appropriation Act of 1938 had authorized continuation of projects begun in 1937, and departmental practice carried this into effect by directing such continuation to be applied for by "continuation applications," one of which gave rise to the only Presidential Letter considered. The original Presidential Letter, as well as the other proposals and applications mentioned in the indictment, were wholly ignored and the jury's verdict was supported on those portions of the writings most favorable to the

Government's contention. Thus petitioners have never had a decision by a court on these questions of construction. The jury was left to determine whether the roads were within the purview of authorized work, and its verdict has been upheld like a decision on a question of fact, as one supported by some evidence, whereas the question was one of law for the Court.

In affirming a directed verdict for defendant in an action on an insurance policy in *Hamilton v. Liverpool, London and Globe Ins. Co.*, 136 U. S. 242, this Court said (page 255):

> "Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree, (as in *Uhrig v. Williamsburg Ins. Co.*, 101 N. Y. 362, cited for the plaintiff,) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court. *Turner v. Yates*, 16 How. 14, 23; *Bliven v. New England Screw Co.*, 23 How. 420, 433; *Smith v. Faulkner*, 12 Gray. 251."

Illustrative of decisions of Circuit Courts of Appeals is *Burrows & Kenyon, Inc. v. Warren*, (C. C. A. 1, 1925) 9 F. 2d 1. The jury had made specific finding that by a certain telegram a buyer had waived his right to reject an instalment delivery under a sales contract. In rejecting a verdict embodying this conclusion the Court said:

> "The court also submitted a special question to the jury, as follows:
>
> 'Did the defendant waive any right to object to the proposed delivery of so much of the cargo as

conformed to the contract on the ground that excess lumber was included in it?

'The jury answer: Yes.'

We have difficulty in seeing any legal significance in this finding even if it is legally grounded. It is obviously nothing but the jury's interpretation of the buyer's telegram, supra, sent to the seller on the morning of June 26, when the buyer learned that the invoice covered 861,167 feet, instead of 684,551 feet. The construction of writings is ordinarily for the court, not for the jury. Compare *Goddard v. Foster,* 17 Wall. 123, 142, 21 L. Ed. 589; *General Motors v. Abell,* (C. C. A.) 292 F. 922, 926." (Pages 3 and 4.)

That treating the jury verdict as conclusive was highly prejudicial is shown by examination of the original Presidential Letter of July 17, 1937. This was an authorization which by no possibility could be limited to *existing* roads, since it authorized work wherever "easements . . . *will be* or have been obtained." Since the Presidential authorization referred to by the Court was for continuation of this project it is clear that consideration of all the documents would preclude limitation to existing roads and farm to market highways.

Petitioners are entitled to, but have not had the decision of, *a court* as to the authorized scope of the project, giving due consideration to *all* documents, and not merely a jury verdict, which has been sustained on consideration of only those documents and only those portions of documents which tend to support it.

II.

To the extent that it assumed to construe the various documents thought to delimit the authorized purview of the construction permitted to be done, the Circuit Court of Appeals gave expressions of intention in the Sponsors' proposal for allotment of funds controlling effect over broader authorization contained in the Presidential Letter of allotment, and thereby erroneously decided an important question under the Emergency Relief Appropriation Act of 1938.

The Circuit Court of Appeals quotes (R. 222) a portion of the third project proposal of June 17, 1938 (II R. 157), indicating an intent to apply funds to work on a "hard surface belt" of "farm to market highways," and states (R. 223) that "by no stretch of liberal interpretation could the two roads or lanes here involved, one leading to a creek, be considered as part of any such highway system." The Presidential authorization next quoted (R. 223) contains no mention of "farm to market highways" or "hard surface belts." No limitation is placed upon the type of roads to be constructed except that they be "county owned," and they may be located "throughout Marion County."

Further, the Court quotes (R. 223) from the *proposal* the words "rehabilitation," "reconstruction" and "rebuilding," as referring only to the construction of *existing* roads, although no such words are used in the Presidential Letter of authorization. Finally, it is said that "The only reasonable interpretation of these two documents excludes the original construction of new roads on a privately owned farm tract." (R. 223.)

It thus clearly appears that the proposal is given controlling importance over the Presidential Letter itself, although the purpose expressed in the Emergency Relief

Appropriation Act is to "provide relief and work relief for persons in need," and the President in carrying out this purpose might, and doubtless did, consider that this purpose would be better served by giving broader authority than requested by the Sponsor, even though (which does not actually appear) the Sponsor intended to work only on already existing highways.

We submit, therefore, that in giving the project proposal controlling effect over the Presidential Letter, the Circuit Court of Appeals has misapplied the Emergency Relief Appropriation Act of 1938. Since there was appropriated under this Act a total of $1,425,000,000 for use over the entire United States, we suggest that this question alone is of sufficient importance to require the intervention of this Court.

III.

Knowledge of facts making a plan unlawful or fraudulent is of the essence of the intent to defraud necessary to conviction under the indictment in this case, and such knowledge or intent cannot be inferred from the fact that Derbyshire got something for nothing.

The petitioners' conviction for diversion of W. P. A. funds, and for conspiracy to defraud the United States by so doing, does not rest upon use of the funds contrary to any express provision of the Emergency Relief Appropriation Acts, but upon a use of funds which a *jury* has found to be outside the purview of authorized works as determined by administrative orders and bulletins. They are thus found guilty of crime, not by reason of having done acts specifically forbidden by Congress, (the Appropriation Acts clearly permit use of W. P. A. funds upon public high-

ways), but for having caused the funds to be used on public highways of a type or class which had not been designated for such work by Kortepeter's superiors.

The intent to defraud the United States necessary to conviction under any count of the indictment could not exist without individual knowledge of the provisions of the various documents which are held to render the work illegal. These were facts, not laws, and absent knowledge of the existence of facts which made the proposed use of W. P. A. funds a fraud upon the United States, the petitioner Derbyshire could not have had or formed the intent to defraud necessary to conviction under any count of the indictment. This principle, with reference to a conspiracy to obstruct the administration of justice, was laid down by this Court in *Pettibone v. United States*, (1893) 148 U. S. 197, 206-207, as follows:

> "It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. * * *
>
> Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defense to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when

> justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise."

The principle is also established in *Morrison v. California*, (1934) 291 U. S. 82, where, because a state statute cast upon a defendant the burden of disproving the guilty knowledge essential to a conspiracy, it was held to violate the Fourteenth Amendment.

The Court said (p. 92):

> "In California, *as elsewhere*, conspiracy imports a corrupt agreement between not less than two, *with guilty knowledge* on the part of *each*." (Our italics.)

In the present case no attempt was made to show that petitioner Derbyshire had knowledge of any of the proposals, orders, or bulletins said to have made the building of these roads a fraud upon the United States. Without contradiction the evidence shows that upon inquiry as to the legality of such work, Kortepeter told Derbyshire that it would be necessary to have the roads dedicated to the county. (R. 52, 68.) Derbyshire did dedicate the roads and the dedication was accepted, as conclusively appears from Exhibit B (II R. 304), introduced by the Government. (R. 27.) All this is recognized in the opinion (R. 221). There is absolutely no other evidence tending to show knowledge by Derbyshire of any facts which would make the work unlawful.

We submit that the attempt to supply the want of such knowledge from the circumstance that Derbyshire was (supposedly) obtaining an individual benefit is nothing more than the attempt to substitute some sort of general bad intention for the specific intent required by statute which was condemned in *Pettibone v. United States,* 148 U. S. 197. We quote from page 207:

> "It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but on the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability."

Landen v. United States, (C. C. A. 6, 1924) 299 Fed. 75, is a decision on analogous facts, squarely contrary to the case at bar. There it was held that on charge of conspiracy to defraud the United States by procuring withdrawals of liquor made unlawful by regulations under the National Prohibition Act, knowledge of the existence of the regulations was essential to proof of the intent to defraud, and absent such knowledge the conviction must be reversed.

Even to one with full knowledge of their contents, just which of the determinative writings were controlling of legality and also their proper construction were both questions upon which reasonable minds might differ. Certainly the Court's limitation to "existing highways" and to "farm to market" roads is not quite as clear as the sum of two and two. Consequently it is piling unfounded presumption

upon unfounded presumption to infer from the work itself that it was illegal when this alleged illegality is in truth not axiomatic from inspection of the documents themselves.

Above all it is certainly not true that every expenditure of W. P. A. funds for the exclusive benefit of a single owner is illegal, else rural outbuildings all over the country evidence countless frauds upon the treasury, and abutters on many miles of highways who receive peculiar and individual benefits therefrom are in danger of penal condemnation of which no one ever dreamed.

Those who have in good faith accepted and even sought these conveniences and bounties from public treasuries, national and state, are not to be branded criminals merely because of the special privileges which they enjoy. Lack of a highly developed sense of self-denial is not of itself evidence of intent to defraud.

IV.

The judgment should be reversed as to both defendants under any ground stated in the petition. Since a conspiracy required more than one conspirator, acquittal of Derbyshire necessarily requires acquittal of Kortepeter.

A decision in petitioners' favor on either of the first two questions presented by the petition necessarily applies to each petitioner alike. The third ground, while concerned with the absence of guilty intent on the part of petitioner Derbyshire, likewise requires reversal of the judgment as to Kortepeter for reasons clearly stated in the opinion of this Court in *Morrison v. California*, (1934), 291 U. S. 82, at page 93, as follows:

"Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. *Pettibone v. United States, supra; Gebardi v. United States,* 287 U. S. 112, 113. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. *In re Akado, supra.* The conviction failing as to the one defendant must fail as to the other. *Turinetti v. United States, supra; Williams v. United States,* 282 Fed. 481, 484; *Gebardi v. United States, supra.*"

CONCLUSION.

In this brief no attempt has been made to discuss at length the extremely involved issue of the application and construction of the various proposals, applications, Presidential Letters and bulletins referred to in the indictment and introduced in evidence for the purpose of establishing that the work done and contemplated to be done upon the roads here in question was illegal and unauthorized.

The doubtful applicability of any of these instruments and their vague and in many cases contradictory statements serve but to illustrate the point that petitioners were seriously harmed by the failure of both the Trial Court and Appellate Court to declare definitely just which documents, if any, were controlling and in permitting a jury verdict on such a question to stand without decision of the question as one of law. The entire record is such as to lead to the conclusion that petitioners have been convicted not because of unauthorized or illegal use of the public moneys or other offenses against the United States, but solely because the petitioner Kortepeter caused W. P. A. work to

be performed on roads which were of peculiar benefit to his father-in-law, Derbyshire.

However reprehensible this conduct may appear from the standpoint of ethics or good morals, it would be a very dangerous doctrine to sustain on this ground alone a conviction of conspiracy to defraud the United States. The entire public controversy which has been waged with reference to the propriety, wisdom and expediency of the work relief program and the method of its administration is, we submit, good and sufficient reason for this Court to scrutinize carefully the conviction of these petitioners under a record such as this. When criminality is made to depend upon supposed distinctions between the improvement of existing highways and highways, however useful, not dedicated to public use at the time of the appropriation, and when the public utility or degrees thereof are made tests of liability under Presidential authorizations which prescribe only public ownership, there is good ground for suspecting that doubtful official morality has been confused with official malfeasance.

It is earnestly urged, therefore, that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reviewed and in all things reversed.

Respectfully submitted,

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